

SUPREME COURT OF FLORIDA

FREDERICK CAVE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No.: 84,643

DCA-1 No.: 89-1694

**ON APPEAL FROM THE DISTRICT COURT OF
APPEAL FOR THE FIRST DISTRICT OF FLORIDA**

INITIAL BRIEF OF PETITIONER

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STATE OF FLORIDA,

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INITIAL BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

Frederick Cave was the defendant in the trial court. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the record on appeal will be used by the symbol "R" followed by the appropriate page number in parentheses and reference to the transcript of the trial proceedings or sentencing hearing will be used by the symbol "T" followed by the appropriate page number in parentheses.

II. STATEMENT OF THE CASE AND FACTS

Petitioner Frederick Cave appealed his convictions and sentences for burglary of an occupied dwelling while armed, robbery with a deadly weapon, and aggravated battery to the First District Court of Appeal. The First District affirmed the convictions and sentences, but certified to the Supreme Court of Florida the following question to be of great public importance:

DOES THE TEMPORAL PROXIMITY OF CRIMES ALONE PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT?

Cave v. State, 578 So. 2d 766 (Fla. 1st DCA 1991).

The Supreme Court of Florida answered this question in the negative, quashed the opinion of the First District affirming the departure sentences imposed on Mr. Cave, and remanded the case for reconsideration in light of the Supreme Court of Florida's holding of Barfield v. State, 594 So. 2d 259 (Fla. 1992). Cave v. State, 613 So. 2d 454 (Fla. 1993). Petitioner Cave now seeks review of the decision by the First District Court of Appeal on remand that again affirmed the departure sentences. Cave v. State, 642 So. 2d 10 (Fla. 1st DCA 1994). The required conformed copy of this opinion of the First District, in addition to copies of all of the above-cited previous Cave opinions from the official reporter, are included in the attached appendix for easy reference.

The facts in this case are that an Alachua County jury in April 1989 found Mr. Cave guilty of the offenses of burglary of an occupied dwelling while armed, robbery

with a deadly weapon, and aggravated battery. The First District, in its original opinion, summarized the facts as follows:

The evidence presented at trial showed that Cave entered the apartment of Dee Ann Cox, without her consent, and that he then struck her, seized an artist's knife she was using and held it to her throat, told her that he would kill her if she did not "shut up," and asked whether she had any money. She then gave Cave her purse, which contained \$30. Cave ran off and was apprehended a short time later.

578 So. 2d at 766. A sentencing guideline scoresheet prepared by the State of Florida placed Mr. Cave in the 4 1/2 to 9 year "permissible range" of the sentencing guidelines (R-68).

The prosecutor requested departure from the sentencing guidelines based on the fact that Mr. Cave's offenses were committed 19 days after he had been released from the Department of Corrections:

Just so the record is clear, I am not going to go into a long dissertation for reasons for departure, but our position is that there is **one valid reason for departure**, and that is the fact that we are talking about a recent release from DOC...(Emphasis added.)

(T-244). The prosecutor noted that the presentence investigation report, and its attachments, showed that the sentence that Mr. Cave had served before committing the new offenses was a five month sentence for violation of probation stemming from an earlier burglary conviction.¹

¹This earlier burglary conviction was originally charged as burglary of a dwelling with assault on the occupant in which Mr. Cave reportedly strangled the victim for a full minute and a half before releasing him. This burglary charge was reduced to burglary of a structure because the victim moved and could not be located before the trial (T-243-244).

Mr. Cave's court-appointed counsel requested that the court not deviate from the sentencing guidelines and noted that the life sentences that the state was seeking would place Mr. Cave in a worse position than an individual who had committed first-degree murder but who had not received a death sentence (T-248). The sentencing court rejected this argument and imposed two concurrent life departure sentences for the armed burglary and robbery offenses and a concurrent 15-year sentence for the aggravated battery offense. The sentencing court wrote on the sentencing guidelines scoresheet only one reason for departure:

Release from DOC 19 days before this offense committed. State v. Williams [Williams v. State], 504 So. 2d 392 (Fla. 1987). F.S. §921.001.

(R-68).

In its opinion on remand, two judges of the First District agreed that the departure sentences were legal and one judge dissented. All three judges agreed that the following question should be certified to the Supreme Court of Florida:

WHEN THE TRIAL COURT EXPRESSLY RELIES UPON TEMPORAL PROXIMITY AND MAKES NO SPECIFIC FINDINGS WITH REGARD TO AN ESCALATING PATTERN OF CRIMINAL CONDUCT, MAY THE DEPARTURE SENTENCE NEVERTHELESS BE AFFIRMED IF THE DOCUMENTS OF RECORD PERTAINING TO DEFENDANT'S CRIMINAL HISTORY, ON THEIR FACE, DEMONSTRATE AN ESCALATING PATTERN OF CRIMINAL CONDUCT?

642 So. 2d at 12. Petitioner Cave invokes the discretionary jurisdiction of the Supreme Court of Florida pursuant to Rule 9.030(a)(2)(A)(v) of the Fla. R. App. P. to answer this certified question of great public importance.

III. SUMMARY OF ARGUMENT

The First District's holding that an appellate court can affirm a departure sentence based on a reason not articulated by the trial court because documents of record show an escalating pattern of criminal conduct by the defendant is contrary to the Supreme Court of Florida's holding in State v. Dodd, 594 So. 2d 263 (Fla. 1992) and further violates the contemporaneous written departure rule mandated in Pope v. State, 561 So. 2d 554 (Fla. 1990) and its progeny. This new standard of appellate review will require the appellate courts to scrutinize the trial and sentencing records in search of evidence of reasons that the trial court could have articulated as a basis for departure which in turn defeats the whole purpose of the contemporaneous written departure rule. Most important, the application of this new standard of appellate review to petitioner Cave's case violates Mr. Cave's right to due process guaranteed by the Florida Constitution because the First District has retroactively applied a new reason to sustain the departure sentences five years after Mr. Cave's sentencing hearing.

IV. ARGUMENT

TEMPORAL PROXIMITY OF CRIMES ALONE IS AN INVALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHEN THERE IS NO FINDING BY THE TRIAL COURT OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT.

The First District Court of Appeal erroneously concluded that it should affirm the departure sentences because of an escalating pattern of criminal conduct shown by its independent review of documents of record even though the sentencing judge made no verbal or written finding of an escalating pattern of criminal conduct. First District Chief Judge E. Earle Zehmer, in his dissenting opinion, correctly observed that Barfield v. State, 594 So. 2d 259 (Fla. 1992) does not authorize an appellate court to scrutinize the record to find evidence of a valid reason for departure from the sentencing guidelines that was not clearly articulated by the trial judge. The First District's holding that appellate courts can now search the record to find a reason for affirmance of a departure reason not articulated by the trial court is a radical departure from this court's sentencing guidelines precedents that limit appellate review to the legality and sufficiency of evidence in support of departure reasons stated by the sentencing court.

Petitioner Cave also agrees with Judge Zehmer's conclusion in his dissenting opinion that this court has already held in State v. Dodd, 594 So. 2d 263 (Fla. 1992) that there must be an explicit finding by the trial judge that a defendant has engaged in a persistent pattern of criminal activity before a departure sentence can be sustained on such a basis where no other valid reasons were recited by the trial court. Not only is the district court's decision contrary to the Dodd decision, but it is also in

conflict with precedent from the First District² and the Second District's opinion in Middlebrook v. State, 617 So. 2d 1161 (Fla. 2d DCA 1993).

In the Middlebrook case, the trial court judge entered a written order departing from the guidelines on five grounds without providing a factual basis for any of the reasons. One of the five reasons included in the "bare bones order" was a continuing and persistent course of criminal conduct by the defendant. In reversing for resentencing within the guidelines, the Second District found that the failure to include a factual basis in support of the reasons for departure rendered the departure order "fatally flawed." Id. at 1162.

The First District's decision shifts responsibility from the trial court and the parties to delineate valid reasons for departure from the sentencing guidelines at sentencing hearing to the appellate courts. Applying the logic that an appellate court can merely review the record to find evidence in support of a valid reason for departure not articulated by the trial court, then in all departure cases the appellate courts will have the responsibility to independently review the trial and sentencing record to see if such evidence can be found. Petitioner concurs with Judge Zehmer's conclusion that there is no rational basis to confining this new standard of appellate review to departure sentences involving proximity of time and escalating patterns of criminal activity. This new appellate review process threatens to swamp the appellate courts with sentencing guideline departure appeals in which parties articulate new

²Wilcoxson v. State, 577 So. 2d 1388 (Fla. 1st DCA 1991).

reasons to sustain departure sentences and the appellate courts will be required to sift through the entire trial and sentence record for evidence supporting these new reasons.

Another consequence not discussed in the First District's opinion, although it was brought to the attention of the First District by petitioner's counsel in a timely motion for rehearing, is that this new procedure for reviewing departure sentences is completely contrary to the Supreme Court of Florida's holding in Pope v. State, 561 So. 2d 554 (Fla. 1990) and its progeny.³ Prior to petitioner Cave's case, the First District acknowledged that this case holds that a departure sentence may only be imposed if the trial court, at the time of sentencing, reduces to writing the correct and permissible reasons for departure. *See e.g.*, Williams v. State, 607 So. 2d 478 (Fla. 1st DCA 1992) (Booth, J. concurring).⁴ This contemporaneous written departure rule is meaningless if an appellate court can now fashion a reason for departure not

³Jones v. State, 639 So. 2d 28 (Fla. 1994); King v. State, 623 So. 2d 486 (Fla. 1993); Padilla v. State, 618 So. 2d 165 (Fla. 1993); Smith v. State, 598 So. 2d 1063 (Fla. 1992); and Owens v. State, 598 So. 2d 64 (Fla. 1992).

⁴*See also* Perry v. State, 635 So. 2d 1083 (Fla. 1st DCA 1994); Brown v. State, 634 So. 2d 735 (Fla. 1st DCA 1994); Scott v. State, 629 So. 2d 1070 (Fla. 1st DCA 1994); State v. Schank, 625 So. 2d 999 (Fla. 1st DCA 1993); Henderson v. State, 622 So. 2d 172 (Fla. 1st DCA 1993); and Kelly v. State, 616 So. 2d 100 (Fla. 1st DCA 1993).

articulated by the trial court long after sentencing.⁵ In petitioner Cave's case, the First District has found a new reason for departure five years after sentencing!

Ironically, it was the First District itself that embraced the wisdom of requiring the trial court, as opposed to the appellate court, to articulate in writing a reason for departure. In Johnson v. State, 584 So. 2d 95 (Fla. 1st DCA 1991), the First District, in its discussion of the importance of requiring written findings in contempt cases, mentioned as an example that the sentencing guidelines also require specific findings. The First District at that time discussed the advantages of requiring written findings:

The alternative of allowing oral pronouncement to satisfy the requirement for a written statement is fraught with disadvantages which, in our judgment, compel the written reasons.

First, it is very possible, and in many instances very probable, that the [facts supporting contempt] plucked from the record by an appellate court might not have been the reasons chosen by the trial judge were he or she required to put them in writing. Much is said at a hearing by many trial judges which is intentionally discarded by them after due consideration and is deliberately omitted in their written orders.

Second, an absence of written findings necessarily forces the appellate courts to delve through sometimes lengthy colloquies in expensive transcripts to search for the reasons utilized by the trial courts.

* * * * *

Lastly, the development of the law would best be served by requiring the precise and considered reasons which would be more

⁵Petitioner acknowledges that in 1993 the Florida Legislature amended the sentencing guidelines at §921.0016(1)(c), Fla. Stat., so that trial courts now have up to fifteen days after sentencing to enter a departure order and written transcription of orally stated reasons as permissible if filed within fifteen days. If Mr. Cave's case arose today, an appellate court, under the First District's analysis, could evade this fifteen day statutory requirement altogether by merely reviewing the record for evidence that could have supported a departure reason.

likely to occur in a written statement than those tossed out orally in a dialogue at a hectic ... hearing.

Id. at 97 *citing* State v. Jackson, 478 So. 2d 1054, 1055-1056 (Fla. 1985).

Not only does the new appellate review process adopted by the First District ignore the advantages of the requirement of a contemporaneous written departure rule, but it also violates a fundamental due process that is guaranteed by Article I, Section 9 of the Florida Constitution. In Mr. Cave's case, Mr. Cave's court-appointed counsel was never put on notice that the state was seeking life departure sentences based on an escalating pattern of criminal conduct. Indeed, petitioner's trial counsel could not reasonably foresee the retroactive application of such a departure reason given that Mr. Cave did not even qualify at the time of sentencing for habitual offender sanctions because he had only one prior felony conviction. If Florida's due process guarantee is to have any meaning at all, then the First District's opinion must be quashed in its entirety.

V. CONCLUSION

The decision of the First District in this case should be quashed in its entirety. Because this court has already held that temporal proximity alone is not a valid reason for departure from this case, and no other reasons were articulated by the trial court in support of the departure sentences, the trial court on remand should be instructed to resentence petitioner Cave within the permissive range of the sentencing guidelines. The trial court may not enunciate new reasons for a departure sentence since the original reason given for the departure sentences--temporal proximity--has already been declared invalid by this court. Shull v. Dugger, 515 So. 2d 748, 750 (Fla. 1987).

Dated this 20th day of February, 1995.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this initial brief of petitioner has been furnished by mail delivery to Charlie McCoy, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 this 20th day of February, 1995.

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